Supreme Court, U.S.
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No. 93-1263

In The

Supreme Court of the United States

October Term, 1994

ERROL BERNARD,

Petitioner,

v.

HARRY CONNICK, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS NEW ORLEANS DISTRICT ATTORNEY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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MAY IT PLEASE THE COURT:

This brief reply is respectfully submitted by petitioner, Errol Bernard ("Bernard"), in rebuttal to the Response to Petitioner's Application filed by respondent, Harry Connick ("Connick") in his individual capacity.

I. Connick's alleged lack of awareness as to his potential liability further justifies grant of certiorari.

Rather than defend the lower courts' holding that Connick is entitled to qualified immunity because the rights secured by *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), were not clear and unequivocal in 1975, Connick now asserts that this holding is not germane and is irrelevant. Instead, Connick argues that the correct inquiry, the one which should have been made by the district court, is the state of the law in 1975 regarding his culpability for his deputies' failure to respect Bernard's *Brady* rights. Connick contends that if the law did not clearly impose liability on him in 1975 for his failure to train his deputies to obey *Brady*, then he is entitled to qualified immunity from suit.

If this novel approach to the qualified immunity defense raised by Connick is truly what underpins the decisions of the lower courts in this case, as suggested by Connick, then this Court has all the more reason to grant writs in this case. A holding that Connick is entitled to qualified immunity because his *culpability* for the violation of clearly established constitutional rights was not clearly established is *res nova*, and contrary to the holdings of every other court that has ever considered a qualified immunity defense in a case where a supervisor

is sought to be held liable for the failure to train or supervise his or her subordinates. Connick's own opposition glaringly, and tellingly, omits any citation of authority to support the proposition now offered by him.

Most recently, the Fifth Circuit itself, sitting *en banc*, appears to have rejected the rule now offered by Connick. In *Doe v. Taylor Independent School District*, 1994 WL 45241 (March 3, 1994), a school principal sought to exonerate himself from personal liability for failure to supervise a coach who sexually abused one of his students by arguing, *inter alia*, that he was entitled to qualified immunity because his responsibility to supervise his employees, and his potential liability under § 1983, was not well-established in 1987, the time of the assault. After finding that the principal's potential liability was clear in 1987, the Fifth Circuit went on to reject the principal's defense on more expansive grounds:

> [T]he school officials' argument that with constitutional immunity they could ignore the teacher/coach's physical sexual abuse of an impressionable 15-year old student is, as a practical matter perverse, and as a legal matter, not supported by the case law. Such an argument neither legally nor logically makes any sense.

1994 WL 45241, *15. Judges Higginbotham and Politz explained in their concurrence that the principal's argument confused the question of cause with the inquiry as to the certainty of the constitutional right that was allegedly violated:

> The certainty of the illegality of [the principal's] failure is a direct reflection of the certainty that the abuse by the coach was itself illegal under

> both state and federal law. If it is true that [the principal] was a cause of the coach's abuse of power because he knew and was indifferent to the occurrence, there is no room for "legal" uncertainty. In every practical sense of the word this school principal was a cause of the wrong. The assertion that his "duty" to do anything was uncertain is unconvincing.

Id., at *23.

Accordingly, Connick's new-fangled interpretation of the lower courts' obviously erroneous decision, offered in a last ditch effort to defend what is otherwise indefensible, only gives this Court additional justification for granting certiorari in this case. The "holding" of the lower courts, as explained by Connick, is totally contrary to the prevailing approach taken to qualified immunity in all circuits, including the Fifth Circuit. It also expands the reach of qualified immunity far beyond the limits so judiciously imposed by this Court upon the doctrine in its most recent visitations of the issue by affording immunity to a state actor on the ground that he or she may not have been aware of his or her potential liability for conduct that may be blatantly unconstitutional.

II. Connick's confusion, which apparently mirrors that of the lower courts in this case, as to the difference between this Court's "deliberate indifference" standard required in cases of municipal liability and the lesser standards applicable to claims for supervisor liability in their personal capacities further justifies grant of certiorari.

Since Connick obviously cannot dispute that the lower courts applied the "deliberate indifference"

standard reserved by this Court for cases of municipal liability to this individual capacity claim, he argues that "an argument can and should be made" that the same standard for liability should apply to both types of cases. Be that as it may, no court, until the Fifth Circuit in this case, has made or accepted this argument, again as evidenced by Connick's inability to muster even the slimmest shred of authority to support his contention that "deliberate indifference" must be proved in this individual capacity case. Connick could have cited the *en banc* Fifth Circuit's recent decision in *Doe v. Taylor Independent School District, supra,* which holds exactly that.

> The Court's reasoning in assessing a municipality's liability leads us to use the same standard in assessing an individual supervisor's liability under § 1983.

1994 WL 45241, *9.

If *Doe*'s rationale supplies the missing explanation for the holding masked by the Fifth Circuit's *per curiam* affirmance in the instant case, then this Court has been given further reason to grant certiorari.

Integral to this Court's holding in *City of Canton v. Harris,* 489 U.S. 378, 389, 109 S.Ct. 1197, 1205, 103 L.Ed.2d 412 (1989), was the fact that the cause of action asserted was one for *municipal* liability. This Court expressly found that the "deliberate indifference" standard, which is the litmus test of intentional conduct, is required in cases of municipal liability in order to insure that municipalities are only held responsible for failure to supervise when such failure is the result of an official policy of the municipality. *See* 489 U.S. at 389, 109 S.Ct. at 1205. In individual

capacity cases, the existence of an official policy, as evidenced by intentional conduct, is simply irrelevant. Individuals can be held liable for conduct that does not rise to the level of an intentional act (although it appears that something more than mere negligence may be required). Indeed, this Court has repeatedly held that a showing of intentional conduct is not required in individual capacity suits – that there is no "state of mind" requirement. *See Daniels v. Williams*, 474 U.S. 327, 329-30, 106 S.Ct. 662, 664, 88 L.Ed.2d 662 (1986); *Parratt v. Taylor*, 451 U.S. 527, 534, 101 S.Ct. 1908, 1912, 68 L.Ed.2d 420 (1981).

Despite Connick's and the Fifth Circuit's confusion, this Court has never displayed the slightest indicia of disorientation as to the distinction between official and individual capacity actions, and has cogently explained why each type of action is deserving of its own unique standard of liability.

> On the merits, to establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. *See, e.g., Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). More is required in an official-capacity action, however, for a governmental entity is liable under § 1983 only when the entity itself is a "moving force" behind the deprivation, *Polk County v. Dodson*, 454 U.S. 312, 326, 102 S.Ct. 445, 454, 70 L.Ed.2d 509 (1981) (quoting *Monell, supra*, 436 U.S. at 694, 98 S.Ct. at 2037); thus, in an official-capacity suit the entity's "policy or custom" must have played a part in the violation of federal law. *Monell, supra; Oklahoma City v. Tuttle*, 471 U.S. 808, 817-818, 195 S.Ct. 2427, 2433, 85 L.Ed.2d 781 (1985); id., at 827, 828, 105

S.Ct. at 2437, 2438 (Brennan, J., concurring in judgment).

Kentucky v. Graham, 473 U.S. 159, 166, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 (1985). *See also Hafer v. Melo*, ___ U.S. ___, 112 S.Ct. 358, 361, 116 L.Ed.2d 301 (1991). Nor have the other circuits been as perplexed as the Fifth Circuit has apparently become. *See* Bernard's Petition for Certiorari, at 18-22.

This case offers this Court the vehicle to end the bewilderment, which is surely destined to escalate now that the Fifth Circuit has adopted the holding of the instant case as its officially announced rule in *Doe v. Taylor Independent School District, supra*. Certiorari should be granted in this case so that, as Connick asserts, "the argument can and should be made" that the "deliberate indifference" standard applies in individual capacity cases, and then once made, that argument can be rejected.[1]

III. The specter of ultimate vindication raised by Connick is no reason to deny certiorari.

Finally, Connick argues that certiorari should not be granted in this case because, despite the flagrant legal

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[1] It is likely, but not certain, that certiorari will be sought in *Doe v. Taylor Independent School District, supra*. Since the instant case and *Doe* share at least one issue in common – whether the "deliberate indifference" standard applies in individual capacity cases – this Court may wish to defer action on the instant petition, in order that it may consider it along with *Doe* in that event a petition is filed in the later case. Counsel will keep this Court informed of further developments in *Doe*.

errors committed by the lower courts, he would ultimately be vindicated because he is not guilty of any culpable conduct under *any* theory of liability which might be employed in this case. He points to the fact that each of his deputies was a law school graduate who had passed the Louisiana State Bar Examination, a fact which in his mind dispensed with any need on his part to ensure that they understood and properly applied *Brady v. Maryland, supra,* and its progeny. Aside from this specious reasoning,[2] Connick's argument does not detract from the need for this Court to grant certiorari in this case, and at a minimum, issue a *per curiam* order to the lower court to reconsider the case in light of the controlling precedents. The contention that it is acceptable to toss Bernard out of court on spurious grounds because ultimately he may have lost anyway does not serve either the interests of justice in this case, or the development of the law in general, both of which are marred by the lower

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[2] Many of Connick's deputies could have been admitted to the bar prior to *Brady;* criminal law courses form only a small portion of the training received in law school; are usually almost entirely elective; and the criminal law portion of the Louisiana State Bar Examination is one of, if not the most, often failed sections of that test by persons who still receive an overall passing score. Here, the proof is in the pudding. Connick's deputies in this case did not understand enough about *Brady* to realize their obvious obligation to turn over the most basic types of exculpatory evidence withheld in this case.

courts' flagrant deviation from the established rules which govern § 1983 actions in every other jurisdiction.

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